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## THE INFLUENCE OF MAGNA CARTA ON AMERICAN CONSTITUTIONAL DEVELOPMENT.\*

For seven centuries Magna Carta has exerted a powerful influence upon constitutional and legal development. During the first four centuries after 1215 this influence was confined to England and the British Isles. With the growth of the British Empire during the last three hundred years, the principles of the Charter have spread to many of the political communities which have derived their constitutional and legal systems from England, and which have owed in the past, or which still owe, allegiance to the mother-country. The earliest and perhaps the most important phase of this imperial history of Magna Carta is its effect upon the constitutions and laws of the American Colonies and of the Federal Union that was established after their War of Independence.

In this story of the Charter's influence upon American constitutional development three separate periods should be distinguished. The colonial period, which began with the granting of the first Virginia Charter by James I in 1606 and which ended about 1760, was followed by the epoch of the American Revolution. With the Treaty of Paris of 1783, in which Great Britain acknowledged her former colonies to be "free, sovereign and independent States", the present period of national existence had its definite beginnings. Each one of these periods is closely related to earlier events and ideas in the history of England and of

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\*The present paper was prepared especially for the Magna Carta volume of the Royal Historical Society of England. Owing to the War this volume, designed as a part of the Magna Carta celebration of 1915, has not yet appeared. Through the courtesy of the editor of the Magna Carta volume we are enabled to publish this article in the Columbia Law Review.

the colonies. Together the three periods constitute American constitutional and legal evolution as a whole: but this American evolution is one that rests for its foundation upon the long centuries of English development that preceded its own beginnings, and that bears also, in a marked degree, the imprint of constitutional and legal changes in England during the period of colonization and even in later times.

Indeed, rightly to understand the constitutional and legal history of the colonies and of the United States of America, in each period of which *Magna Carta* plays a rôle, we should not forget that the Englishmen who settled in America in the seventeenth century inherited all the preceding ages of English history. To them belonged *Magna Carta* and the Common Law; to them belonged the institutions and ideas that were inextricably bound up with *Magna Carta* and the Common Law; to them belonged the legal traditions of the Tudor age—the age that immediately preceded the period of colonisation. The colonies did not fail to enter upon their inheritance. Colonial institutions and principles, both of public and of private law, retained much of the Tudor and the pre-Tudor tradition, and even today American institutions and principles bear the impress of its influence.

For England the seventeenth century was the first great age of the Empire, the age of commercial and colonial expansion not only in the West, but in the East, and it was the age also of the momentous struggle at home between the Crown and Parliament—between the claims of royal prerogative and of parliamentary supremacy. In America the century was preeminently the age of settlement and the growth of chartered colonies, either of proprietary or corporate character, this American development constituting one phase of English expansion. It was likewise the age in which the results of constitutional conflict in England exerted their first influences upon the development of colonial institutions and of colonial legal and political ideas. The growth of the colonies in America meant, from the very beginning, the extension of English institutions and laws to these little Englands across the sea. To their birth-right of the English traditions of the sixteenth and earlier centuries was now added the gift of the constitutional and legal principles established in seventeenth century England, the England of Stuart kings, of Commonwealth and Protectorate, of Revolution; for the changes in the public and private law of England during the century directly and

vitally affected constitutional and legal growth in the colonies. As the Common Law emerged at the end of the century enriched by judicial decisions and constitutional enactments, the fundamental principles which they embodied were added to the Common Law heritage of Englishmen in the colonies. Thus, like Magna Carta itself, the great constitutional documents of the seventeenth century, such as the Petition of Right, the Habeas Corpus Act, and the Bill of Rights, have a colonial as well as a purely English history. To these statutes, as to Magna Carta, the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen, whether they resided in the home-land or in the English communities of America.

Perhaps the most important feature of American history before the revolutionary epoch was the gradual transition from chartered colonies to royal provinces and, owing to British colonial and commercial policy of the times, the tightening of imperial control through Crown and Parliamentary agencies. Although the constitutional changes in England during the eighteenth century, including the further development of Parliamentary sovereignty, vitally affected the relationship between the colonies and the home-country, yet they failed to influence in any marked degree purely colonial constitutional development. President Lowell expresses this forcibly when he says: "American institutions are still in some respects singularly like those of England at the death of Queen Anne. . . . Thereafter the changes in the British Constitution found no echo on the other side of the Atlantic, largely no doubt because taking the form of custom, not of statute, they were not readily observed."<sup>1</sup> From the early eighteenth century down to the present day American institutions have developed, in the main along their own lines, largely upon the basis of English development in the seventeenth and earlier centuries, colonial development in the seventeenth century, and American political thought and constructive statesmanship of the eighteenth, nineteenth and twentieth centuries.

This striking divergence of American from English institutions, dating from the early eighteenth century, is in sharp contrast with the history of the law. Throughout the eighteenth century, though perhaps less in the period of the Revolution, English Common Law continued to influence the development of colonial legislation and judicial decisions; and even today the

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<sup>1</sup>II Lowell, Government of England, 472.

American system of Common Law and Equity is in its fundamental characteristics the same as that of England. So, too, in certain leading features of constitutional law—as distinct from constitutional institutions, such as the American system of three co-ordinate departments of government and the power of the judiciary to declare an act of the legislature null and void because in conflict with the written constitution—we see a striking persistence of English principles. Rights and liberties of Englishmen embodied in Magna Carta, the Bill of Rights, and other constitutional documents became vital features of colonial constitutional law, and have continued throughout the revolutionary and national epochs to the present day to be essential elements of the American law of the constitution.

The story of the influence of Magna Carta on American constitutional development is but one phase of the whole history of English institutions and law in America, and this in turn is but one chapter in the history of a broader, a further-reaching development—the extension of English institutions and of English Common and Statutory Law to the many political communities that have formed or still form parts of the British Empire. In studying Magna Carta in America we are concerned, therefore, with one feature and one only, of this whole vast process. But just as the influence of Magna Carta in England itself cannot be understood apart from the long history of the ever-changing body of rules and principles that go to make up the system of English Common Law, of which the provisions of Magna Carta form only a part, so, too, an understanding of the influence of Magna Carta in America can only be reached by considering this great legal document as but one of the many sources of English Common Law in its American environment. In the present paper certain main features of the American development, throughout its three periods, will be suggested; but without any attempt at exhaustive consideration.

## I.

1. From the very beginning the colonists claimed that they were entitled as Englishmen to the law of Englishmen—the Common Law as a great *corpus juris* based on the decisions of the Courts and on the statutory enactments of Parliament, a body of the rules of private and public law which secured to Englishmen their rights as private individuals in their relations one with another and also their rights and liberties as subjects of the Crown.

It was this Common Law of England which the various colonies, acting through their executive, legislature and judicature, adopted or received, either partially or wholly, as the law adapted to the needs of English communities in America. Along with the English law thus received by the colonists, there grew up in the various American communities new rules and principles based on colonial customs, the reformative skill of colonial law-makers, and, in the Puritan colonies of New England, natural or divine law.<sup>2</sup>

If, for the moment, we view the whole system of English Common Law as partly public and partly private law, even though English legal thought does not draw a sharp distinction between the two, we may the more easily grasp the early attitude of the colonists towards the law of the home-land. Reinsch has expressed this attitude in these words: "English colonists, in their general ideas of justice and right, brought with them the fruits of the 'struggle for law' in England . . . Most of the colonies made their earliest appeal to the common law in its character as a muniment of English liberty, that is, considering more its public than its private law elements."<sup>3</sup> Or, in Channing's phrase: "So far as [the English Common Law] protected them from the English government and from royal officials they looked upon it as their birth-right; so far as it interfered with their development it was to be disregarded."<sup>4</sup> If we bear this fact in mind, we shall see the more clearly that English constitutional statutes and cases were, as their "birth-right", of fundamental importance to the English colonists of America in their struggles with colonial and

<sup>2</sup>In claiming the Common Law as their own the colonists were but applying Coke's doctrine (12 Rep. 29) that "the law and custom of England is the inheritance of the subject."

On the extension of the Common Law to the American colonies, see Reinsch, English Common Law in the Early American Colonies; Sioussat, Extension of English Statutes to the Plantations; Andrews, Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law (all three papers in I Essays in Anglo-American Legal History, 1907, 365-463); Pound, Readings on the History and System of the Common Law (2nd ed.), 262-304; Two Centuries' Growth of American Law 1701-1901 (Yale Essays; 1901); Stevens, Sources of the Constitution of the United States (1894), ch. I, II, VIII; Warren, History of the American Bar (1912), 1-208; Andrews, Colonial Period (1912), 182-185.

On the diffusion of English law throughout the world, see Pollock, Genius of the Common Law (1912), especially ch. VI; Bryce, Roman and British Empires (1914), 79-133.

<sup>3</sup>Op. cit. 414-415; III Hallam, Constitutional History of England (1906), 338: "In quitting the soil of England to settle new colonies, Englishmen never renounced her freedom. Such being the noble principle of English colonization, circumstances favoured the early development of colonial liberties."

<sup>4</sup>I Channing, History of the United States (1905), 529.

imperial authorities. In the earlier Stuart reigns Magna Carta, as the greatest of all English statutes of liberty, was regarded by the colonists as a bulwark of their rights as Englishmen. As the seventeenth century advanced, the great constitutional struggles in England were reflected in the colonies;<sup>5</sup> and the Petition of Right, the Habeas Corpus Act, the Bill of Rights, and the Act of Settlement (1701) took their place beside Magna Carta in the minds of the colonists as statutory guaranties of the rights of Englishmen, both at home and away from home, in respect of life, liberty, and property.<sup>6</sup> It is for this reason that we must view Magna Carta in its history in the colonies as only part—though a most valuable part—of the whole body of English constitutional law, the Common Law in its character of public rather than private law, the Common Law as it is found in constitutional cases and constitutional statutes.

As Englishmen owing allegiance to the Crown and settling upon land claimed by England as under its sovereignty, the colonists were, it would seem, entitled to the rights of Englishmen embodied in Magna Carta and other sources of Common Law without further sanction of royal charter or colonial legislation. But, not only did royal charters to the colonists secure these constitutional rights, they were incorporated also in colonial legislation.

2. The granting of the first Virginia charter by James I in 1606 marks the real beginning of English settlement in America and the opening of a new era in the history of colonization in general. In this famous document—the final form of which was in part the work of Coke himself—the King not only claimed the right to colonize a large portion of the territory of the New World, but he asserted the principle that English colonists in this territory were to enjoy the same constitutional rights possessed by Englishmen in the home-land. This principle had been embodied in the Elizabethan patents to Gilbert and Raleigh; but the colonizing experiments of these adventurers under the Queen's authority had produced no permanent results, and it was not until

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<sup>5</sup>II Channing, *op. cit.* 1908, ch. VI-VIII.

<sup>6</sup>On the claim of the colonists to the benefits of Magna Carta and other constitutional statutes of England, see I Osgood, *American Colonies in the Seventeenth Century* (1904), 258 *et seq.*, III *id.*, 11, 14; I Channing, *op. cit.* 528, 529; II *id.* 222-225; Warren, *op. cit.* 103; Story, *Constitution of the United States*, § 149; Cooley, *General Principles of Constitutional Law* (2nd ed.) 5-8.

after James's patent to the Virginia Company that the principle first took root in American soil. "Also we do", reads James's charter, "for Us, our Heirs, and Successors, Declare, by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions."<sup>7</sup>

It was this principle, repeated in many later charters to the American colonies, which gave to English colonization one of its most distinctive characteristics. In ancient times and in the sixteenth and seventeenth centuries the colonists of other countries were not privileged to enjoy the constitutional guaranties of the inhabitants of the colonizing states themselves; on the contrary, colonists were viewed as persons outside the constitutional and legal system of the home-country itself. It may well be questioned, as already suggested, whether the solemn declaration of the principle by English sovereigns was essential to the valid extension of English laws and constitutional privileges to the colonists; rather is it true to say that the colonists who settled on territory claimed by England and who recognized their allegiance to the English Crown, carried with them, whether the King willed it or not, so much of the English constitutional and legal system as was applicable to their situation. The government of Plymouth rested, throughout its history as a separate colony, upon the Mayflower Compact, not upon royal charter. Penn's patent as proprietor in 1681, unlike the other colonial charters, contained no provision to the effect that the inhabitants of the colony should be deemed subjects of the Crown, and as such entitled to all the liberties and immunities of Englishmen; but, as the territory of the colony was claimed by England and as the allegiance to the Crown was reserved, it would seem clear that the colonists were subjects and as such entitled to all the privileges of Englishmen. This, at any rate, was the opinion of the great Chalmers in regard to Penn's

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<sup>7</sup>For the text of the first Virginia charter, see Macdonald, Select Charters and Other Documents Illustrative of American History 1606-1775 (1910), 1-11. Other colonial charters will be found in the same volume.

patent. But, whatever view we may hold upon this question, a solemn enunciation of the principle in royal charters furnished a solid documentary basis for the claim of the colonists that they possessed the rights of Englishmen. Royal charters were held by the colonists to be solemn compacts between the King and themselves; and these solemn compacts constituted the earliest written constitutions of the colonies. Embodied as they were in these fundamental instruments of government their constitutional rights as Englishmen seemed to the colonists unassailable. Time and time again, in their struggles with colonial and imperial authorities, the colonists relied upon their charters as the documentary evidence—the written title—of rights secured to them, as to all Englishmen, by Magna Carta, the Bill of Rights, and the general principles of the Common Law. The declaration of the royal charters thus acted as a powerful factor in the spread throughout the colonies of English constitutional principles—including the rights and liberties secured by Magna Carta and its confirmations.<sup>8</sup>

3. There is another feature of the royal charters which deserves attention: their expressed declaration that the colonies may legislate for themselves so long as the laws thus enacted conform to the English legal system. Thus, by way of example, the Massachusetts charter of 1691 explicitly says: "And we doe . . . grant to the said Governor and the great and Generall Court . . . full power and Authority from time to time to ordaine and establish all manner of wholesome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England)." <sup>9</sup>

This grant of legislative power to the colonies produced important results, not the least of which was the growth of a body of colonial statutory law adapted to the needs of the new English

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<sup>8</sup>On the royal charters as grants to the colonists of the constitutional rights of Englishmen, see I Channing, *op. cit.* 157-162, 308-309; Stevens, *op. cit.* 1-34; Egerton, *Short History of British Colonial Policy* (2nd ed.) 17-19, 70; cf. *ibid.*, 508, 509. On the charters as the earliest American constitutions and as the foundation of the constitutions of the national era, see Thayer, *Legal Essays* (1908), 3, 198.

<sup>9</sup>For the text of the Massachusetts charter of 1691, see Macdonald, *op. cit.* 205-212.

Similar provisions are inserted in the commissions and instructions issued to provincial governors. See Greene, *The Provincial Governor* (1907), 93-97, 162-165, 207-270.

communities across the sea. Both in form and in substance much of this written law of the colonies was a re-enactment of the common and statutory law of England, and thus conformed to English legal traditions and to the requirements of the charters. On the other hand, the colonial legislatures introduced into their laws and codes many new features especially adapted to local conditions. Some of these features were archaic in character, while others, in their spirit of reform, were actually in advance of contemporary law in the mother-country. In the Puritan colonies of New England the Law of God gave a peculiar colour to the whole legal system; while in all the colonies local customary law moulded, in important respects, the decisions of the courts and the colonial legislation. Not all the resources of imperial control possessed by Crown and Parliament could keep the growing American communities, with their novel conditions and special needs, within the strict confines of the legal system of the mother-country.

Incorporated in this statutory law of the colonies were many principles of English constitutional law derived from the decisions of English courts and from the great charters and statutes of English liberty. Of special interest to us, in our present study, is the embodiment of various rights and liberties of Magna Carta in the colonial written law. Even in the Puritan colonies of New England, which in theory based their earlier legal system upon the Word of God, and which in fact of all the colonies departed furthest from English juridical models, we find important features of Magna Carta placed in legislative colonial enactments. Indeed, in these and in other vital respects, English Common Law formed a greater element in Puritan law than the Puritans themselves at the time suspected, and than even present-day students of their system, attracted by the frequent citation of Scripture in decisions and statutes, are often-times aware.<sup>10</sup> The laws of all the colonies deserve a long and detailed study with special reference to their incorporation of the provisions of Magna Carta, but for our present purpose it must suffice to draw attention to illustrative instances of this process.

In early Massachusetts the struggle for written laws, as opposed to the exercise of wide discretionary powers on the part of the executive and judicature, finally resulted in the enactment

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<sup>10</sup>The remarks of Merriam, *History of American Political Theories* (1910), 4, 5, might well serve as the starting-point in a detailed study of the laws of the Puritan colonies.

of the famous Body of Liberties. In the discussions that preceded this legislation, John Winthrop had argued, in his tract on Arbitrary Government, that it was unwise to place too great a restraint upon judges, who should decide cases in accordance with divine justice as revealed in the Bible. Still, even Winthrop admitted that, for the purpose of restricting capital punishment and of making men's estates more secure against heavy fines, it would be well to have a general law like Magna Carta. The general position of the colonists was that their liberties were not safe from arbitrary power, because these liberties were not embodied in positive law. Winthrop, in his History of New England, says: "The deputies having conceived great danger to our State in regard that our magistrates for want of positive law in many cases might proceed according to their discretion, it was agreed that some men should be appointed to frame a body of grounds of law, in resemblance to a Magna Carta, which being allowed by some of the ministers and the General Court, should be received for fundamental laws". Accordingly, at the General Court, May 25th, 1636, it was ordered that a body of laws "agreeable to the word of God", to be the "Fundamentals of this Commonwealth", should be drawn up and submitted to the General Court. As a result of this action the Body of Liberties finally became the law of the Colony in 1641. Although the Word of God figures prominently in this code, the law-makers seem also to have followed in some sections the model of Magna Carta and of the English Common Law. Thus, for example, in its first section the Body of Liberties echoes the spirit of chapter thirty-nine of Magna Carta by declaring that, "No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arrested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under Coulor of law, or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country warranting the same, established by a generall Court and sufficently published or in case of the defect of a law in any partecular case by the word of god. And in Capitall cases, or in cases concerning dismembbring or banishment, according to that word to be judged by the Generall Court."<sup>11</sup>

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<sup>11</sup>See, further, I Osgood, *op. cit.* 180, 181, 193-195; Warren, *op. cit.* 63, 64. For the text of the Body of Liberties, see Macdonald, *op. cit.* 72-91.

In 1646 there arose an important controversy as to the constitutional guaranties of the Body of Liberties and other Massachusetts laws, which involved a careful examination of the provisions of Magna Carta by the colonists. Certain residents of the colony, led by Robert Child, discontented largely by reason of the religious policy of the colonial authorities, addressed the General Court, declaring that a settled government in accordance with the laws of England did not appear to them to have been established, and that they did not feel secure in the enjoyment of their lives, liberties and estates as free-born English subjects. They petitioned, therefore, for the establishment of the wholesome laws of England, that they might thus be admitted to the liberties to which all free Englishmen were accustomed both at home and in the colonies. In their reply to the petitioners the General Court compared at length the provisions of the Body of Liberties with those of Magna Carta and the principles of the Common Law. The Court maintained that this comparison demonstrated the fact, that English and colonial laws were in agreement in all fundamental particulars, and that indeed civil liberty in Massachusetts under the Body of Liberties was as well protected as it was in England under Magna Carta and the Common Law. The General Court also sent in 1646 an address to the Long Parliament in which it was declared, that the government of the colony was framed in accordance with the colonial charter and "the fundamental and common laws of England, and conceived according to the same—taking the words of eternal truth and righteousness along with them as that rule by which all kingdoms and jurisdictions must render account of every act and administration in the last day". They then tried to prove the truth of their statement by setting forth in parallel columns the fundamental and common laws of England and the laws of the colony. In this comparison Magna Carta was viewed by the General Court as the chief embodiment of English Common Law.<sup>12</sup>

Connecticut, following the example of Massachusetts, early enacted a law embodying fundamental rights and liberties; and trial by jury, together with other English institutions and practices, became part of the colonial system. So, too, in 1647, Rhode Island adopted a code of civil and criminal laws based in part upon English laws that were thought adapted to the needs

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<sup>12</sup>For further details of this controversy, see Reinsch, *op. cit.* 380, 381; I Osgood, *op. cit.* 256 *et seq.*; Stevens, *op. cit.* 15; and the authorities cited in these works.

of the colony. Prefixed to these "Lawes" was a reaffirmation of chapter thirty-nine of Magna Carta prohibiting arbitrary arrests and punishments, and a declaration that by law of the land (*lex terrae*) was meant the law enacted by the General Assembly of the colony itself—not the law of England, unless adopted by the Assembly as colonial law.<sup>13</sup>

The New York "Charter of Liberties" of 1683 was the first statute enacted by the colonial legislature after the English conquest of Dutch New Netherlands. This statute, framed expressly for the colony by the Duke of York, secures a jury trial to all inhabitants of the colony and contains many of the provisions of Magna Carta, the Petition of Right, and the Habeas Corpus Act. Although the Charter of Liberties never received the royal assent, because it savoured too strongly of popular freedom and seemed to run counter to the Crown's prerogative and the legislative supremacy of Parliament, yet the colonists always claimed that it was operative in protection of their constitutional liberties.<sup>14</sup>

The colonial Assembly of Maryland passed a bill in 1638 to recognise Magna Carta as a part of the law of the province. The act expressly declared "that the inhabitants shall have all their rights and liberties according to the great charter of England". The act was, however, disallowed by the King, because the Attorney General expressed himself as uncertain "how far the enactment thereof will be agreeable to the constitution of this colony or consistent with the royal prerogative".<sup>15</sup>

In 1712 the colonial legislature of South Carolina by special act adopted the English Common Law as a rule of adjudicature, and also one hundred and twenty-six English statutes selected by Chief Justice Trott as applicable to colonial conditions. Included among the English statutes thus put in force by the colonial legislature were Magna Carta and the other great English statutes which declared the rights and liberties of the subject. The similar adoption of English Common Law and statutes was effected by the legislature of North Carolina in 1715.<sup>16</sup>

A striking illustration of the attention paid to Magna Carta by colonial law-makers is found in the history of Virginia. In

<sup>13</sup>Reinsch, *op. cit.* 388, 389; I Osgood, *op. cit.* 357; Stevens, *op. cit.* 17.

<sup>14</sup>Warren, *op. cit.* 91; II Osgood, *op. cit.* 165-168; but see Stevens, *op. cit.* 20, n. 1.

<sup>15</sup>II Channing, *op. cit.* 223, n. 1; Stevens, *op. cit.* 18.

<sup>16</sup>Reinsch, *op. cit.* 407, 408; Warren, *op. cit.* 119.

the middle of the seventeenth century a sharp controversy arose in this colony—as elsewhere in America—in regard to lawyers. In 1756 certain colonial acts hostile to lawyers were repealed; but in the following year a proposition for the ejection of lawyers was carried. Thereupon a new act was passed by the legislature forbidding any person to plead or give advice in any judicial proceedings for reward. The governor and council did not look with favour on this act, but they promised to give their assent to the measure “so far as it shall be agreeable to Magna Carta”. An examination of the terms of Magna Carta was then made by a committee, who reported that they failed to discover in them any prohibition of the colonial legislation in question.<sup>17</sup>

These and other colonial acts and codes which might be instanced prove that the colonial legislatures, representing in general the wishes of the colonists as opposed to those of royal officials, embodied principles of English Common Law, including provisions of Magna Carta, the Bill of Rights, and other great constitutional statutes, in the written law of Englishmen within the over-sea provinces. In general colonial legislation, which is an important feature of the working of early American self-government, was subjected to imperial control by reason of the requirement that colonial acts must receive the assent of the Crown acting through the royal governors and the executive authorities in England. That the royal veto, which remained in full vigour in the relations of the Crown to the colonies long after its disuse in respect to acts of the English Parliament, was employed to safeguard the interests of the royal prerogative, is strikingly illustrated by the history of colonial acts which embodied Magna Carta and other English legal guaranties of the rights and liberties of the subject. Attention has already been drawn to the fact that the Maryland act of 1638 enacting Magna Carta was disallowed by the Crown because it might be inconsistent with the royal prerogative, and that the New York Charter of Liberties of 1683, embodying Magna Carta, the Petition of Right and the Habeas Corpus Act, never received the royal assent. Similarly, Sir John Somers, by reason of the fear that it might prejudice the royal prerogative and the legislative supremacy of Parliament, advised the disallowance of the Massachusetts Habeas Corpus Act on the ground that the right to that writ “had never been conferred on the colonists by a king of England” and that

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<sup>17</sup>Reinsch, *op. cit.* 406.

the guaranty of a speedy trial in Magna Carta was inapplicable to the status of colonists.<sup>18</sup> Various other acts of colonial legislatures which merely repeated provisions of Magna Carta were likewise vetoed by the Crown.<sup>19</sup>

It is clear that the exercise of the royal veto—which always in theory, and many times in practice, acted as a wholesome restraint upon unwise colonial legislation and served to keep the law of the colonies in general harmony with English law—worked injustice to the colonists and sought to deprive them of their rightful privileges and liberties as English subjects, including the guaranties of Magna Carta and other English constitutional statutes. The exercise of the royal veto, particularly when it encroached upon their rights and liberties as Englishmen, was irritating to the colonists, but proved in most, if not all, cases ineffective. By disregarding the royal veto, by enacting new measures essentially like the ones vetoed, and by other similar devices, the colonists practically nullified the royal prerogative of disallowance.<sup>20</sup> In effect, therefore, much of the colonial legislation which incorporated the principles of Magna Carta and other constitutional features of the Common Law, remained in force in the colonies. Indeed, the whole history of Magna Carta and English constitutional liberties as incorporated in the acts and state papers of the later colonial period, the revolutionary epoch and the early national era, proves the persistence of the legal guaranties of the English constitution in America. For the maintenance of what they viewed as the rights of all Englishmen, the colonists were not only willing to face the Crown and Parliament in constitutional struggles, but also in armed conflict. When the time of their independence came, the people still insisted, as we shall see later, on the incorporation of their fundamental rights and privileges in the federal and state constitutions, the parts

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<sup>18</sup>On Somers' opinion, see II Channing, *op. cit.* 223, n. 1.

<sup>19</sup>See II Channing, *op. cit.* 241, 242; Bancroft, in his History of the Colonization of the United States (I History of the United States Edinburgh [1840], 417), remarks: "If the declaratory acts, by which every one of the colonies asserted their right to the privileges of Magna Carta, to the feudal liberty of taxation except with their own consent, were always disallowed by the crown, it was done silently, and the strife on the power of parliament to tax the colonies was certainly adjourned."

<sup>20</sup>On the exercise of the royal veto in the colonies, see, further, Andrews, Colonial Period 175-178; II Channing, *op. cit.* 240-245; III *id.* 6. The disregard of the royal veto by the colonists is an excellent illustration of the way in which Englishmen in America, following the example of their kinsfolk at home, were "acquiring a 'constitution' by robbing the crown of its prerogatives". See Andrews, *op. cit.* 243, 244.

of these instruments containing the declaration of rights being known as "Bills of Rights".

4. It is worth noting that "Magna Carta" became a generic term which included various documents of special constitutional significance. Attention has already been drawn to the fact that the Massachusetts Bill of Liberties of 1641 was framed, in Winthrop's words, "in resemblance to a Magna Carta". The act of the New York legislature of 1683, which was known as the "Charter of Liberties and Privileges", and the Pennsylvania "Charter of Privileges", which was the fundamental law of the province from 1701 to 1776 and the "most famous of all colonial constitutions", may also perhaps be reckoned in this category. The instructions issued by the Virginia Company in 1618 to Sir George Yeardley as governor are known to Virginian writers as the "Great Charter"; and the term is said to be found also in some of the land grants. But while this document of 1618 was undoubtedly of great importance in the constitutional development of the colony, it is perhaps going somewhat too far to liken it to a Magna Carta.<sup>21</sup> The use of the term "Great Charter" is instructive, however, as showing the influence of Magna Carta upon legal terminology. Another illustration may be taken from the history of the Carolinas. In 1668 the proprietors of northern Carolina authorized the governor to grant land on the same terms and conditions as those that prevailed in Virginia. The colonists always referred to the instrument containing this authorization as the "Great Deed of Grant" and regarded it as a species of Magna Carta.<sup>22</sup>

A point of even greater importance for our present purpose is that constitutional documents granted by colonial proprietors sometimes contain the clauses of Magna Carta itself. Thus, for instance, in the constitutions granted by the proprietors of New Jersey and Pennsylvania in the latter part of the seventeenth century, careful provision is made for the protection of personal liberty and of property and the familiar phrases of Magna Carta reappear.<sup>23</sup>

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<sup>21</sup>On the Instructions of 1618, see I Channing, *op. cit.* 203.

<sup>22</sup>II Channing, *op. cit.* 16, 17.

<sup>23</sup>For further details, see II Osgood, *op. cit.* 192, 193; II Channing, *op. cit.* 46, 56.

As William Penn seems to have had a hand in the framing of all these documents which embodied the phrases of Magna Carta, it is instructive

As a result of the constitutional struggles in England during the seventeenth century, the Petition of Right<sup>24</sup> and the Bill of Rights similarly served as models for colonial constitutional documents; while, after the American Revolution, the "Bill of Rights" in which fundamental civil rights and liberties are declared, takes its place, as already observed, as an established feature of the constitutions of the federal and state governments.

Thus, the very names of Magna Carta and the Bill of Rights were transmitted to America through the influence of the English Constitution, and terminology in this case, as so often in the history of institutions and laws, masked no mere shadow, but the very flesh and blood of living rights.

5. Hitherto we have considered the embodiment of the principles of Magna Carta in the written law of the colonies in royal charters, colonial laws and codes, and colonial documents of constitutional significance. A further question suggests itself in regard to the unwritten law of the colonies. Were the provisions of Magna Carta incorporated in case-law? In a Massachusetts case of 1687 the defendant pleaded that Magna Carta and the statute-law "secure the subjects' properties and estates". To this one of the judges replied, the rest of the court by silence assenting, "We must not think the laws of England follow us to the ends of the earth".<sup>25</sup> But such a judicial utterance is characteristic of the general attitude of Massachusetts and of the other Puritan colonies. Their legal system, avowedly based on the Law of God, contained many English features, but only in case they had been expressly adopted by the colonial authorities were they viewed as binding. It was but natural, therefore, for the Massachusetts judges to declare that they were not bound by Magna Carta itself, which as a complete document had never been adopted by the colony. But, through the Bill of Liberties—and possibly other colonial acts—certain provisions of Magna Carta were taken up into Massachusetts law. In

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to observe that in 1670, when he was indicted in an English court for being present at an unlawful and tumultuous assembly in Gracechurch Street, and there addressing the people in contempt of the King and of his law and against his peace, Penn claimed for himself the rights of Englishmen as set forth in Magna Carta and its confirmations. Penn's case may be studied in 6 Howell's State Trials. II Channing *op. cit.* 105, 106 gives a short account of it.

<sup>24</sup>II Channing, *op. cit.* 330, n. 2, refers to a "Petition of Right" in colonial Pennsylvania.

<sup>25</sup>See Warren, *op. cit.* 11.

general we may say that principles of Magna Carta and the Common Law actually adopted by the legislatures of the colonies as their own law, undoubtedly bound the colonial courts, unless such enactments had been effectively vetoed by the Crown; and, in this connection, it should not be forgotten, as we have already observed, that the veto of the Crown often proved of no avail in checking the growth of colonial statutory law, even though that law seemed to the Crown to be infringing upon its prerogative. In colonies where Magna Carta was adopted as a complete instrument, and where the royal veto, if it was applied, proved ineffectual, it would seem that the courts must surely have applied its provisions in the cases that came before them. It has been impossible to examine the court records, many of them still in manuscript, from this point of view; but it may be supposed that their careful study would disclose many cases where the courts applied the colonial Magna Carta—if one may be allowed the term—just as they applied in general the principles of the colonial Common Law. It may well turn out, on further research, that in at least four distinct ways the courts embodied the principles of Magna Carta in colonial case-law: *first*, in cases interpreting and applying colonial legislation, such as the Massachusetts Body of Liberties, the Rhode Island Code of 1647, and the New York Charter of Liberties of 1683, which contained certain provisions of Magna Carta; *secondly*, in cases interpreting and applying colonial acts which adopted the whole text of Magna Carta; *thirdly*, in cases decided under colonial acts which adopted the whole of the English Common Law as the rule of colonial adjudicature; *fourthly*, and in general, in decisions of the many courts that were engaged, together with other institutions of the colonies, in adopting and adapting, either consciously or unconsciously, such portions of the English law as best suited the legal requirements of the colonial communities. This view, that colonial case-law will be found, on examination, to embody principles of Magna Carta, is strengthened by the well-known fact that in judicial proceedings of the period parties frequently claimed the rights of “every free born English subject”.<sup>28</sup>

6. There is abundant evidence that in the political and constitutional controversy of the colonial period the rights of the colonists as Englishmen played a vitally important part. In these disputes Magna Carta and other English statutory guaranties of

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<sup>28</sup>For an instance of this, see II Channing, *op. cit.* 479; *cf. ibid.* 487.

the subject were relied upon as the source of political privilege and civil right.<sup>27</sup>

An illustration of this is to be found in the Dyer affair in New York during the governorship of Edmund Andros. Complaints as to the administration of Andros and even suggestions that New York officials had been guilty of peculation and extravagance, resulted in the Duke of York's summons to Andros in 1680 to return to England for the purpose of rendering an account of his doings. Before his departure from the colony Andros had neglected to renew the customs duties. Learning that the duties had thus legally expired, colonial merchants declined to pay the imposts which the Duke's collector, William Dyer, continued to levy. Having seized a vessel and her cargo, Dyer was successfully sued by the owner for unlawfully detaining property which was not his own; and he was also indicted for high treason, the indictment charging him with having "contrived innovations in government and the subversion and change of the known, ancient, and fundamental laws of the Realm of England . . . contrary to the great Charter of Liberties, contrary to the Petition of Right, and contrary to other statutes in these cases made and provided." On appealing his case to England, Dyer was successful there; and Andros also exculpated himself. Despite all this, however, the colonists still refused to pay the duties levied on the authority of James. Channing, in his History of the United States, has drawn attention to the fact that "this movement was the first colonial rebellion against taxation from England, and [that] the words of Dyer's indictment carry one backward to the times of the Puritan Rebellion in England and forward to the days of Otis, Henry, and Dickinson in America." Looked at from the point of view of the rights of Englishmen away from home, the Dyer case is a striking instance of the colonists' dependence upon Magna Carta as the bulwark of their liberties.<sup>28</sup>

A further illustration may be taken from the history of Massachusetts. In this, as in other colonies, questions in regard to the governor's salary loom large in the political controversy of the times. The assembly of Massachusetts insisted on making temporary salary grants, thinking by this means to secure a real control over the governor's actions. The governor's contention,

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<sup>27</sup>On political and constitutional controversy in the colonies, see Greene, *op. cit.* ch. VIII-XI; II Channing, *op. cit.* ch. X, XI.

<sup>28</sup>On the Dyer case, see Greene, *op. cit.* 38; II Osgood, *op. cit.* 130, 131, 163, 164; II Channing, *op. cit.* 60.

on the other hand, was that permanent provision should be made for his salary, thus ensuring his free judgment in matters of legislation, on the analogy of English provision for the Crown by a permanent civil list. In one of Governor Burnet's messages to the Assembly in 1728 in regard to the salary question, he drew their attention to the provision in the colonial charter that they were to pass wholesome and reasonable laws which were not harmful to the English Constitution. The members of the Assembly caught up this reference to the charter and contended that the governor himself had thus admitted that they possessed the rights of Englishmen. In support of their contention they then proceeded to trace their rights as Englishmen not only to the English legislation of the Stuart and Tudor periods, but also to the English Constitution in the time of Edward I and Henry III, and even to Magna Carta itself. The exciting events that followed did not result in a settlement of the controversy in Burnet's time; and only under his successor, Belcher, was it finally arranged that the governor, with the consent of the English government, should receive an annual grant, to be voted at the beginning and not at the end of the sessions of the assembly. The course of this controversy thus forms an interesting chapter in the history of Magna Carta as the foundation of colonial rights in opposition to the claims of the Crown and of royal governors.<sup>29</sup>

7. The importation from England, as well as the colonial publication, of English statutes and documents, law reports and juristic treatises, diffused, especially in the eighteenth century, a knowledge of the common and statutory law, and thus acted as a very considerable factor in the extension of its principles—including the principles of Magna Carta and the English Constitution—throughout the colonies.<sup>30</sup> Prominent among the books in the hands of the colonists were those dealing with the rights and liberties of Englishmen. Thus, among the first seven books printed in the colonies were Hawles' *The Englishman's Rights* (1693), Petyt's *Lex Parliamentaria* (1716), Somers' *The Security of Englishmen's Lives* (1720), and the fifth edition of Henry Care's *English Liberties or the Freeborn Subjects' Inheritance*

<sup>29</sup>A short account of the salary controversy in Burnet's time is given by II Channing, *op. cit.* 292-294. A valuable contribution to the literature of the salary question in the colonies generally will be found in Greene, *op. cit.* 59-64, 78, 79, 117, 118, 167-176.

<sup>30</sup>Nearly all the law books of the colonists were imported from England. Only thirty-three were printed in America before 1776.

(1721), the last of which contained Magna Carta, the Petition of Right, the Habeas Corpus Act, and various other English statutes, as well as some of the leading English constitutional decisions and a general account of the liberties of the subject, trial by jury, and other constitutional matters. Both in public and in private libraries were to be found copies of Year Books, English reports, Magna Carta and collections of English statutes, and the classics of English literature, such as the works of Glanvill, Britton, Fortescue, Prynne, Bacon, Selden, Coke, Plowden, Hale, and Blackstone.<sup>31</sup>

In this way the printed text of Magna Carta and the commentaries of the English jurists upon that text played their own special part in the legal education of the colonists and thus in their adherence to the Charter's principles of constitutional liberty. One or two interesting facts will illuminate this textual power. Thus, in 1647, the Governor and Assistants of Massachusetts ordered the importation of two copies each of Coke on Magna Carta and various other books of English law "to the end that we may have better light for making and proceeding about laws".<sup>32</sup> As early as 1687 William Penn published at Philadelphia an edition of Magna Carta, the Confirmation of the Charters and the so-called Statute *de Tallagio non Concedenda*, accompanied by an address to the reader wherein the colonists were exhorted "not to give away anything of Liberty and Property that at present they do . . . enjoy, but take up the good example of our ancestors, and understand that it is easy to part with or give away great privileges, but hard to be gained if once lost".<sup>33</sup> As a silent teacher of English notions of liberty, not only in Massachusetts and Pennsylvania, but in the other colonies as well, the printed text of the Charter exerted its own unique influence upon the legal and political ideas and the actual institutions of the Americans.

8. Throughout the colonies there existed a deep distrust of the legal profession. Most of the colonial judges were laymen; and there was much colonial legislation hostile to lawyers as a class. In the course of the eighteenth century, however, the legal profession, many of its members trained in the English Inns of Court

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<sup>31</sup>Full details of the importation and colonial publication of English legal texts and treatises will be found in Warren, *op. cit.* ch. II-VI, VIII, IX, XIV. See especially ch. VIII.

<sup>32</sup>Two Centuries' Growth of American Law, 13, n. 3; Warren, *op. cit.* 71.

<sup>33</sup>II Osgood, *op. cit.* 253; Warren, *op. cit.* 103.

and in American Universities, began to take a more prominent part in colonial affairs. During the revolutionary epoch lawyers played a leading rôle in political and constitutional controversy; while in the early days of independence, when the federal and state constitutions were drafted and adopted and the laws and institutions of the youthful Republic were moulded to fit the new conditions, some of the foremost statesmen and judges were lawyers of high distinction.<sup>34</sup>

The rise of a legal profession introduced a new and powerful factor in the growth of American legal ideas. Learned in the principles of English Common Law and in English constitutional ideas and practices, the early American lawyers exerted a professional—a legal—fluence upon American development; and their share in the work of incorporating the principles of Magna Carta in colonial and revolutionary documents and in the constitutions of the federal era must have been considerable.

Without pursuing this special topic further, in the present connection, we may yet note in a general way the services of the early American lawyers in the cause of the rights and liberties of the people. Warren, in his History of the American Bar, expresses the main point in these words: "The influence, on the American Bar, of these English-bred lawyers . . . was most potent. The training which they received in the Inns, confined almost exclusively to the Common Law, based as it was on historical precedent and customary law, the habits which they formed there of solving all legal questions by the standards of English liberties and of rights of the English subject, proved of immense value to them when they became later (as so many did become) leaders of the American Revolution".<sup>35</sup> Again, in another place, Warren remarks: "The services rendered by the legal profession in the defense and maintenance of the people's rights and liberties, from the middle of the Eighteenth Century to the adoption of the Constitution, had been well recognized by the people in making a choice of their representatives; for of the fifty-six Signers of the Declaration of Independence, twenty-five were lawyers; and of the fifty-five members of the Federal Constitutional Convention, thirty-one were lawyers, of whom four had studied in the Inner Temple, and one at Oxford, under Black-

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<sup>34</sup>On the history of the legal profession in America before 1789, see Warren, *op. cit.* 1-238; Two Centuries' Growth of American Law, 13-17, 265, 266.

<sup>35</sup>*Op. Cit.* 188.

stone. In the First Congress, ten of the twenty-nine Senators and seventeen of the sixty-five Representatives were lawyers."<sup>36</sup>

## II.

By the close of the colonial period principles of Magna Carta, adapted to social and political conditions in the American communities, had become firmly embedded in their systems of law and government. In the revolutionary epoch—extending from 1760 to 1783—these principles, as part of the whole body of English constitutional law claimed by the colonists as English subjects, were to enter upon a new phase of their American history.

The years that immediately preceded the outbreak of War in 1775 and the Declaration of Independence in 1776 were characterized by a momentous controversy between the colonies and the mother-country over constitutional principles. The doctrine that the colonists had all the rights of Englishmen had more and more strenuously asserted itself throughout the eighteenth century. At last the claims of the colonists were largely focussed in the demand that there should be no taxation without representation, a principle which they held to be based on firm English foundations. As the controversy increased in intensity the colonists appealed less to the guaranties of the royal charters and more and more to the principles of the Common Law, especially the principles contained in Magna Carta, the Bill of Rights and other documents of English liberty, in support of the views which they so strenuously asserted in opposition to the position taken up by Crown and Parliament. In the ten years just before the War there was indeed a marked tendency, evidenced by all the great state papers, such as the Massachusetts Circular Letter of 1768, the Virginia Resolutions of 1769, the Declaration and Resolves of the First Continental Congress of 1774, the Declaration of the Causes and Necessity of Taking up Arms (1775),<sup>37</sup> and the Declaration of Independence (1776) itself,<sup>38</sup> to base colonial rights on political and legal fundamentals to be found in the Law of Nature and the English Constitution. The colonists looked upon the English Constitution as their own and revered it as the embodiment of their rights. The "common rights of Englishmen"

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<sup>36</sup>*Op. Cit.* 211.

<sup>37</sup>For the texts of these documents, see Macdonald, *op. cit.* 330-335, 356-361, 374-381.

<sup>38</sup>The text will be found in Macdonald, Documentary Source Book of American History 1606-1878 (1908), 190-194.

formed the shield behind which they resisted what they held to be attempts upon their liberties. When the War at last came, it was fought out by the colonists in defence of what they held these rights to be—rights won in England in the long struggle for the rule of law and embodied in the doctrines of Common Law, especially in the principles of Magna Carta, the Bill of Rights and other English documents that visualized for the colonists their claims for freedom as opposed to tyranny. Thus it resulted, that the controversy between England and her colonies and the war that followed it were largely caused by differences of opinion as to constitutional and legal questions, and that in the struggle of the colonists for what they looked upon as their rights, Magna Carta, as one of the fundamentals, as a part of the legal inheritance, the “birth-right”, of Englishmen at home and in the colonies, played a rôle of great prominence.<sup>39</sup>

### III.

In respect of private law the Revolution resulted in no break with the past. After, as before the Revolution, the Common Law, adapted and modified by its American environment, formed the general basis of private rights; and this feature of American law survives to the present day. So, too, in the matter of constitutional institutions, the Revolution made less difference than is sometimes imagined; for, in many of their main characteristics, the federal and state governments of the national era followed precedents of the colonial and revolutionary epochs. Thayer, in his essay on the American Doctrine of Constitutional Law, sums up the Revolution in two short sentences: “The Revolution came, and what happened then? Simply this: we cut the cord that tied

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<sup>39</sup>On the political and constitutional controversies of the revolutionary epoch, see, further, VII Cambridge Modern History, ch. V: The Quarrel with Great Britain 1761-1776 (Doyle), ch. VI: The Declaration of Independence 1761-1776 (Bigelow), ch. VIII: The Constitution 1776-1789 (Bigelow); III Channing, *op. cit.* (The American Revolution 1761-1789); Channing, *The United States of America* (1896), ch. II; Stevens, *op. cit.*, ch. II; Two Centuries' Growth of American Law 9-47; Merriam, *op. cit.* ch. II, III.

The American theory was summed up by Otis in one of the earliest (1764) political pamphlets of the Revolution: “Every British subject, born in the continent of America, is, by the laws of God and Nature, by the Common Law, and, by Act of Parliament, entitled to all the natural, inherent, and inseparable rights of our fellow subjects in Great Britain.” See Channing, *The United States of America*, 45. To what extent, if any, Magna Carta alone and of itself gave the colonists a basis for their version of the principle that there should be no taxation without representation may be seen by a perusal of McKechnie, *Magna Carta* (2nd ed.), 231-240.

us to Great Britain, and there was no longer an external sovereign." That the federal and state constitutions contained vitally important features that were distinctively American, as opposed to English, is one of the commonplaces of political history. The institutional divergence from English models which set in, as we have already observed, during the early eighteenth century was sure to produce ultimate results very different from some of the leading features of the English Constitution. The federal nature of the Union, the sanctity of the written constitution as a document embodying the fundamental law, the co-ordination of the legislature, executive, and judicature as the three departments of government which operate in distinct spheres and enjoy equality of position, the remarkable power of the judicature to declare an act of the legislature that conflicts with the written constitution null and void—these are four of the main characteristics which mark a wide gulf between American constitutional institutions and the unwritten Constitution of England, under which Magna Carta and the Bill of Rights, although of fundamental significance, are yet subject, like any ordinary statute and the decisions of the courts, to the legislative sovereignty of Parliament.<sup>40</sup> But, in at least one highly important respect the American constitutions display a striking adherence to the traditions of the English Constitution. In the "Bill of Rights", which forms a part of each of the written constitutions, both state and federal, there is a persistence of those fundamental rights of Englishmen embodied in Magna Carta, the Bill of Rights of 1689, and other leading sources of the Common Law. This whole development is summarized by Sir Frederick Pollock in one sentence of *The Genius of the Common Law*: "Our fathers laboured and strove chiefly in the field of Crown law to work out those ideals of public law and liberty

<sup>40</sup>It should not be forgotten that one of the deep-seated causes of the Revolution was that ever since the early eighteenth century the institutions of England and of the colonies had been drifting apart, and that the colonists, unlike their kinsfolk in the mother-country, did not recognize the supremacy of Parliament as an imperial legislature. In one important aspect, therefore, the American Revolution of the eighteenth century was like the English Revolution of the seventeenth century. McIlwain forcibly expresses this in the words: "As in 1688 England itself destroyed what might, with show of truth, be argued to be the legitimate powers of the King, so in 1776 the Americans, by another Revolution, threw off an authority which was unquestionable on its merely legal side . . . [The] American Revolution was primarily a struggle to repudiate the legal claims of an imperial Parliament . . . Strict adhesion to that theory . . . had led to the division of the British Empire; it had 'rent asunder the English race.'" See, further, McIlwain, *High Court of Parliament and Its Supremacy* (1910), 366; III Channing, *History of the United States*, 1, 12; Merriam, *op. cit.* ch. II.

which are embodied in the Bill of Rights and are familiar to American citizens in the constitutions of the United States and of their several commonwealths.”<sup>41</sup> It is this American Bill of Rights, forming an important element in constitutional law, as distinct from constitutional institutions, which chiefly links the American constitutions of to-day with the Magna Carta of 1215.

1. As the direct descendants of the royal colonial charters, these charters being based on still earlier models, the state constitutions are the oldest feature of American political life. Nearly all of the original thirteen colonies, when they declared their independence and framed their state constitutions, included in these documents, as perhaps their most important feature, a declaration of the fundamental rights and liberties of man. Most of the clauses of this declaration, known collectively as the Bill of Rights, were taken over from colonial and revolutionary laws and constitutional documents, the contents of which, in turn, as we have already seen, had been derived originally, in important particulars, from Magna Carta, the Bill of Rights and other great constitutional statutes which secured the liberties of Englishmen. As new states have been admitted into the Union, from time to time, they too have embodied a Bill of Rights in their constitutions. In this way, therefore, the Bill of Rights of the state constitutions traces its pedigree back to Magna Carta. In each separate state of the federal republic, as in England, the Great Charter of 1215 still exists, protecting men in their lives, liberties, and estates from the encroachments of arbitrary or tyrannical government.<sup>42</sup>

Naturally the state constitutions vary in the form of words chosen to express the rights and liberties derived from Magna Carta. Some constitutions, more especially, perhaps, the earlier ones, follow the original model closely; others are couched in terms more suited to American conditions. But the main features of the

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<sup>41</sup>*Op. Cit.* 89.

<sup>42</sup>I Bryce, *American Commonwealth* (1910), 426-463, gives a summary account of state constitutions and their history. On p. 438 he says: “The Bill of Rights is historically the most interesting part of these [State] Constitutions, for it is the legitimate child and representative of Magna Carta, and of those other declarations and enactments, down to the Bill of Rights of the Act of 1 William and Mary, session 2, by which the liberties of Englishmen have been secured.” Bryce refers (p. 447, n. 1) to a remarkable decision of Chancellor Kent of New York, in which the great jurist proceeded upon the broad general principle which he found in Magna Carta. Dicey, *Law of the Constitution* (8th ed.), 195, n. 1, contrasts the English and American Bills of Rights with similar declarations in continental countries.

original are in all cases retained in the American derivations. So, too, the constitutions vary one from the other in the extent to which they borrow from the Great Charter. Some take more and some less, but in all are to be found, in one phrasing or another, the essence of chapter thirty-nine.<sup>43</sup>

2. The Federal Constitution of 1789, including the Amendments of 1791 and of later times, is likewise derived in part from the colonial charters and from other constitutional and legal sources of the colonies and of England. In Lord Bryce's felicitous words: "The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove. There is little in this Constitution that is absolutely new. There is much that is as old as Magna Carta."<sup>44</sup>

The Constitution of 1789 embodies, in one article or another, various declarations of the fundamental rights of men. Thus, for example, it provides for taxation by the legislature only, for the privilege of the writ of *habeas corpus*, for trial by jury in criminal cases, for the prohibition of bills of attainder, *ex-post facto* laws, laws impairing the obligation of contracts, and laws imposing religious tests. These and other provisions, derived in large measure from English and colonial precedents, constitute a body of constitutional guaranties of the highest value.

But the absence of a formal Bill of Rights similar to the one included in state constitutions was at once severely criticised by the people as a feature of the Constitution dangerous to their liberties.<sup>45</sup> In response to persistent demands, ten Amendments, taking effect in 1791, were added to the original instrument. These first ten Amendments, which are to be viewed as a supplement or postscript to the original Constitution, and not as an alteration of

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"See Dillon, *Laws and Jurisprudence of England and America* (1894), 207. In § 16 Const. of Oklahoma, admitted to the Union in 1907, Chapter 39 of Magna Carta appears in the phrasing, "No person shall be deprived of life, liberty or property without due process of law." See the comments of Frankfurter, 28 Harvard Law Rev. 790-793, on the Bill of Rights of the State of New York in the light of present judicial and legislative tendencies.

<sup>43</sup>I Bryce, *op. cit.* 28.

<sup>44</sup>Some of the leading statesmen held the same view. Thus, Jefferson said: "I hope that a Declaration of Rights will be drawn up to protect the people against the Federal government, as they are already protected in most cases against the State governments." Jefferson seems to have had in mind the Bill of Rights embodied in State Constitutions.

it, make up what is called, after the English and earlier American precedents, the Declaration or Bill of Rights. In essence this Bill of Rights secures the rights and liberties of the individual citizens and the separate states against the encroachments of the federal government.<sup>46</sup> Although each of the Amendments added to the Constitution after 1791 demands separate consideration, both in respect to its general scope and the place it holds in the whole body of the Constitution, yet we may regard the Thirteenth, Fourteenth and Fifteenth Amendments, in certain of their fundamental characteristics, as later additions to the Bill of Rights contained in the first ten Amendments.

It is said that the people regarded the liberties embodied in the first ten Amendments as their own, because they were based on old English law.<sup>47</sup> Certainly a study of the Amendments reveals the fact that the origin of some of their features is to be traced to the common and statutory law of England. Certain of their clauses are undoubtedly based directly, or indirectly through colonial and revolutionary precedents, upon Magna Carta, the Bill of Rights, and other English constitutional documents. Thus, upon Magna Carta rests the provision in the Fifth Amendment that no person "shall be deprived of life, liberty, or property, without due process of law". Similarly, the Fourteenth Amendment (1868), in declaring that no state shall "deprive any person of life, liberty, or property, without due process of law", adopts, like the Fifth Amendment, the thirty-ninth chapter of Magna Carta. The last clause of the First Amendment, which provides that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances", seems to go back for its origin—through various American documents—to the English Bill of Rights. So, also, upon the English Bill of Rights is based the Second Amendment, which declares that "A well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed." In the words of Judge Cooley: "The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights . . . where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people,

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<sup>46</sup>Stevens, *op. cit.* 211-214; I Bryce, *op. cit.* 27, 367. Macdonald, Documentary Source Book of American History 1606-1898, 216-232, 494, 536-538, 546, 547.

<sup>47</sup>Stevens, *op. cit.* 213, 214.

and as a pledge of the new rulers that this tyrannical action should cease." Again, the Eighth Amendment is almost an exact transcript of the clause in the English Bill of Rights which provides "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted". The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".<sup>48</sup>

These and other provisions in the Federal Constitution rest upon the constitutional law of England. Magna Carta's contribution to the federal instrument, and to the state constitutions, consists fundamentally in the adaptation of the famous chapter thirty-nine to meet American conditions. This chapter had been embodied in colonial law. By its incorporation in state constitutions and in the Fifth and Fourteenth Amendments to the Federal Constitution it still serves as the basis of the rule of law throughout the Republic.

3. Legal and historical accuracy may well be placed in jeopardy by considering the "due process of law" clauses apart from their full setting in the Amendments and in the whole scheme of fundamental law as set forth in the complete federal instrument. But, with this caution, a few words, in explanation of the meaning and scope of the clauses may be ventured.

The last words of the Fifth Amendment (1791) declare that "no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." The last portion of section one of the Fourteenth Amendment (1868) reads: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." American political and constitutional history of absorbing interest and moment surrounds every word of these due process of law clauses. Suffice it here to say that the prohibition of the Fifth Amendment was introduced as a check upon the federal government as distinct from the state governments; while in the Fourteenth Amendment, adopted after the great Civil War

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"See, further, Cooley, *op. cit.* 281; Stevens, *op. cit.* 222-224, 230, 232, 233. Some of the American precedents of the colonial and revolutionary periods will be found in Macdonald's collections of sources.

between the North and the South, the prohibition is directed against the individual states that compose the Union. Thus the two Amendments, under the dual government inseparably incident to American federalism, supplement one the other. Together the Amendments ensure to the people their individual rights to life, liberty and property under the rule of law as opposed to arbitrary and tyrannical action on the part of either state or federal governments.

The due process of law clause of the Fourteenth Amendment represents, therefore, the latest obligation of America to Magna Carta. Indeed, as Judge Dillon, in commenting on the constitutional guaranties of the two Amendments, remarks: "This was not new language, or language of uncertain meaning. It was taken purposely from Magna Carta. It was language not only memorable in its origin, but it had stood for more than five centuries as the classic expression and as the recognized bulwark of 'the ancient and inherited rights of Englishmen' [Burke] to be secure in their personal liberty and in their possessions. It was, moreover, language which shone resplendent with the light of universal justice; and for these reasons it was selected to be put into the Fifth Amendment of the Federal Constitution, as it had already been put into the charters and constitutions of the several States. . . . It was of set purpose that [the prohibitions of the Fourteenth Amendment] were directed to any and every form and mode of State action [as opposed to Federal action]—whether in the shape of constitutions, statutes, or judicial judgments—that deprived any person, white or black, natural or corporate, of life, liberty, or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation . . . [It] will hereafter, more fully than at present, be regarded as the American complement of the Great Charter, and be to [America]—as the Great Charter was and is to England—the source of perennial blessings."<sup>49</sup>

The Supreme Court of the United States has never attempted to give a rigid and complete definition of "due process of law".

<sup>49</sup>Dillon, *op. cit.* 208-212. Adams, *Origin of the English Constitution* (1912), 243, in commenting on chapter thirty-nine of Magna Carta, remarks: "What was then [1215] demanded was a trial according to law and securing to them [the barons] their legal rights. Taken in this sense clause 39 of Magna Carta would correspond somewhat closely to the general prohibition included in Amendment XIV to the Constitution of the United States: 'nor shall any State deprive any person of life, liberty, or property without due process of law.'"

The policy of the Court has been expressed in the recent case of *Twining v. New Jersey*<sup>50</sup>: "This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land', contained in that chapter of Magna Carta, which provides that 'no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land'". In *Hagar v. Reclamation Dist.*<sup>51</sup> the Court had already expressed the view that the meaning of "due process of law" is that "there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights". So, too, in *Bank of Columbia v. Okely*<sup>52</sup> it was said: "As to the words from Magna Carta, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."<sup>53</sup>

Although the due process of law phrase is thus historically derived from and closely related to the phrase *per legem terrae* of Magna Carta, nevertheless, in the application of the clause to the institutions of government in the two countries, there is a marked difference between the Constitution of England and that of America. In England the provisions of Magna Carta, including chapter thirty-nine, were originally intended, and have since been regarded, as a limitation upon the executive and judicature, not upon the legislature. In English law chapter thirty-nine is held to mean

<sup>50</sup>(1908) 211 U. S. 78, 100, 28 Sup. Ct. 14.

<sup>51</sup>(1884) 111 U. S. 701, 708, 4 Sup. Ct. 663.

<sup>52</sup>(1819) 17 U. S. 235, 244.

<sup>53</sup>The literature upon the due process of law clauses is very voluminous. The main points are considered by Cooley, *op. cit.* 229-238; II Willoughby, Constitutional Law of the United States (1910), §§ 460-476; Hall, Constitutional Law (1911), §§ 144-149.

that no person is subject to the arbitrary acts of the Crown or its Courts—that no person shall be deprived of his life, liberty, or property unless in accordance with the existing law of the land, whether it be common law or statutory law. Parliament is not affected by the limitations imposed on the Crown and the Courts. Legally the Parliament is the sovereign power and can at any moment alter the law of the land by its enactments: the rights of the individual are in theory and in practice subject to the supreme legislative power of Parliament.<sup>54</sup>

As this legislative supremacy of Parliament was fully established by the time of the adoption of the Fifth and Fourteenth Amendments, it might be contended that historically their due process of law clauses were not intended to operate as a limitation upon the powers of the state legislatures and of the federal Congress. But American constitutional government, both state and federal, is based on written instruments, which, in the sphere of political and legal activity, are fundamental and supreme, though subject, of course, to the principle that they may be amended by the people acting through the machinery which the constitutions themselves provide. In vital differences between the English unwritten Constitution and the American written constitutions we must seek for the explanation of certain features of American divergence from English precedents. In result the general purpose of written constitutions in America has gradually come to be entirely different from the purpose of Magna Carta and the other great constitutional documents of England. In America, to employ Willoughby's careful analysis, "written instruments of government and their accompanying Bills of Rights have for their aim the delimitation of the powers of all the departments of government, the legislative as well as the executive and judicial, and it is, therefore, quite proper to hold that the requirement of due process of law should not only prohibit executive and judicial officers from proceeding against the individual, except in conformity with . . . procedural requirements . . . but also operate to nullify legislative acts which provide for the taking of private property without compensation, or life or liberty without cause, or, in general, for executive or judicial action against the individual of an arbitrary or clearly unjust and oppressive character."<sup>55</sup>

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<sup>54</sup>See II Willoughby, *op. cit.* § 469.

<sup>55</sup>II Willoughby, *op. cit.* §§ 469-470. On the general character of the American Written Constitution, see I Bryce, *Studies in History and Jurisprudence* (1901), 145-254. See, also, I Bryce, *American Commonwealth*,

By a long and careful process of judicial construction the prohibitions of the due process of law clauses have thus come to be applied to all three departments of the state and federal governments—the legislative no less than the executive and judicial. The Supreme Court of the United States in the leading case of *Hurtado v. California*<sup>56</sup> emphasises the fundamental distinction between the constitutional doctrines of England and of America, and shows that the provision of Magna Carta has been incorporated into American constitutional law, but incorporated in a way which brings it into harmony with American notions not only of the supremacy of the written constitution and of the co-ordination of the three departments of government under that constitution, but of the great power entrusted to the courts of declaring legislative acts which conflict with the constitution null and void. In this case the Court say<sup>57</sup>: "The concessions of Magna Carta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*<sup>58</sup> the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and

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part I; and Dicey, *op. cit.* 134-176, on the American doctrine of the supremacy of the written constitution. On English constitutional history in its relation to the American limitation of the powers of legislative bodies and to "that peculiar feature of the American unwritten constitution, the power of the judiciary to declare laws regularly adopted to be void because unconstitutional", see the suggestive comments of Adams, *op. cit.* 42. On this power of the American courts, see, further, I Kent, *Commentaries on American Law* (1896), 448-454; Thayer, John Marshal (1901), 72 *et seq.*, and *Legal Essays* (1908), 1-41. Dicey, *op. cit.* 196, n, has only one of the three departments of government in mind when he remarks that the American Bills of Rights have "the distinct purpose of legally controlling the action of the legislature by the Articles of the Constitution."

<sup>56</sup>(1884) 110 U. S. 516, 4 Sup. Ct. 111.

<sup>57</sup>At p. 531.

<sup>58</sup>8 Rep. 115, 118a.

the provisions of Magna Carta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. . . . Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights of life, liberty, and property."<sup>59</sup>

The history of Magna Carta in America has a meaning far deeper than the influence of a single constitutional document; for Magna Carta typifies those English ideals of law and government which have spread to America and to many other political communities that lie beyond the four seas encircling the island-realm itself. The world-wide diffusion of those ideals of liberty and justice deserves to be studied in its entirety as a vast historical process which had its beginnings far back in the middle ages and which has shaped and is still shaping in modern times the institutions of all the political commonwealths that owe their spiritual inheritance to England. The history of the Charter's influence upon American constitutional development, as one phase of that vaster process, should be illuminating to all citizens of the Republic. Above all it teaches them that English political and legal ideals lie at the basis of much that is best in their institutions. Those ideals, jealously preserved and guarded by Americans throughout their whole history, should continue to animate them as they adapt their institutions to the ever-changing conditions of national and international life. William Penn was right when he exhorted the colonists "not to give away anything of Liberty . . . but take up the good example of our ancestors, and understand that it is easy to part with or give away great privileges, but hard to be gained if once lost."

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<sup>59</sup>Hall, *op. cit.* 133; II Willoughby, *op. cit.* § 470. For further views of the Supreme Court in regard to the "law of the Land" of Magna Carta and the "due process of law" clauses of the Amendments, see Hall, *op. cit.* 132. A recent decision of the Supreme Court upon due process of law (*Frank v. Mangum* (1915) 237 U. S. 309, 35 Sup. Ct. 582) which promises to become a *cause célèbre*, is discussed in 28 Harvard Law Rev. 793-795.